HUA HUNG FURNITURE

v.

YUSUF DOR

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[CIVIL APPEAL NO. 2 OF 1991]
19 MARCH 1993

PRACTICE & PROCEDURE: Application to strike out defence - Allegation of fraud in statement of defence - Allegation not particularised - Whether triable issue raised - Application to strike out dismissed - Appeal against decision.

The appellant sued the respondent for the sum of RM25,724.83 allegedly in relation to the completion of sub-contract works done by the appellant in connection with four JKR tenders awarded to the respondent and by virtue of two written agreements between them.

The appellant applied to strike out the statement of defence. The learned Sessions Court Judge after holding that the plea of fraud in the statement of defence was bad for failure to state the particulars of fraud, proceeded to consider whether the respondent had raised a triable issue. In the event the learned trial Judge found that there were triable issues and dismissed the application to strike out the statement of defence.

Held:

[1] Paragraph 3 of the statement of defence could clearly be construed as alleging that the transaction alleged to exist between the appellant and the respondent was a fraudulent one by reason of the fact that the respondent never signed the documents alleged to constitute such transaction and furthermore the said documents contained signatures and chop marks which were forged. To that extent the pleading did explain how and why the alleged transaction was fraudulent.

[2] When the affidavits filed by the respondent are examined against those filed by the appellant, the respondent had been able to raise a triable issue relating to the question as to whether or not the signatures and/or chop marks of the respondent appearing in the two agreements were forged.

[Appeal dismissed with costs].

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 18(1), O. 14 r. 21, O. 26A r. 1

For the appellant - Chen Tai Huong; M/s. Chen & Co.
For the respondent - Chambai Lindong; M/s. Lau & Co.

JUDGMENT

Steve L. K. Shim J:
This is an appeal by the plaintiff (appellant) against the decision of the Sessions Court at Sarikei in dismissing the application of the appellant to strike out the defence of the defendant (respondent). Initially, it was a double-barrelled application under O. 26A r. 1 and O. 14 r. 21 of the Subordinate Courts Rules 1980, but upon objection by Counsel for respondent, the application proceeded under O. 14 rule 21 alone. Counsel for appellant decided to forgo O. 26A r. 1. The application resulted from an action taken by the appellant against the respondent for a sum of RM25,724.83 allegedly in relation to the completion of subcontract works done by the appellant in connection with 4 JKR tenders awarded to the respondent and by virtue of two written agreements between them. The appellant also alleged that the respondent had failed and/or refused to pay the said sum despite repeated demands and reminders.

Although the appellant, in his memorandum of appeal, has propagated 4 grounds of appeal, they can (and this is also reflected in the course of the appellant Counsel's submission) be confined essentially to one single issue, namely, that the learned Judge had erred in law in allowing affidavit evidence to be admitted to correct and or substantiate the allegation of fraud which was not particularised in the statement of defence. Mr. Lau, for the appellant, has submitted that since the learned Judge had come to the conclusion that the plea of fraud in the statement of defence was bad for failure to state the particulars of fraud, she should not have utilized the respondent's affidavit to correct and or substantiate such a defective plea. It should be noted that in her judgment, the learned Judge had said *inter alia*:

> It is to be noted that the defence of fraud was alleged. This defence as it stands in the Statement of Defence is a mere allegation ...
>
> Learned Defence Counsel submitted that the allegation of fraud could not be particularised or pleaded specifically because the defendant had no way of finding out how fraud was committed. All he knew was that he did not sign or stamp the company chop on the agreement. I do not think I can accept the defendant's explanation. The alleged fraud was allegedly committed against the defendant's projects with the JKR. As the successful tenderer and for projects involving a big sum of money, it's improbable that the defendant would not know how fraud, if there was any, was committed against him. There must be ways for him to find out and to particularise by whom fraud was committed, why and how he came to believe that it was committed in this case. Under the circumstances, I rule that the statement of defence as far as it alleged fraud does not disclose a defence.

It seems clear that the learned Judge had found that the allegation of fraud pleaded in the statement of defence was not supported by particulars. She was unable to accept the defence Counsel's contention that such allegation could not be particularised. She felt it quite improbable that the respondent would not know how the alleged fraud was committed against him, he being a successful tenderer and the projects involving a huge sum of money.

Now, to appreciate the stand taken by the learned Judge, it is, I think, not inappropriate to examine more closely the relevant pleadings in the statement of defence of the respondent, in particular paragraphs 3 & 4 therein which state as follows:

> 3. The defendant says that he did not sign any contract agreement with the plaintiffs in respect of the tenders mentioned in paragraph 1 of the statement of claim and in any event the defendants' signature and/or chop appearing on the contract agreement and other documents, which the defendant denies, then the defendant says that the said signature and/or chop has been forged, fraudulently put on, or fraudulently obtained and the transaction was a fradulent transaction.
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> 4. In the premises the defendant says that he never intended to enter into any contract agreement with the plaintiffs in respect of the tenders hereinbefore mentioned and his signature which the defendant does not admit, was fraudulently put on and used without his knowledge and consent and the defendant will say that the alleged contract agreement is not valid and not binding on the defendant.

Quite clearly therefore, the defendant, who is the respondent in this appeal, is contending that the alleged transaction between him and the appellant was fraudulent as he did not sign or execute the agreements referred to by the appellant and that the signatures and chop marks therein had been forged. In my view, paragraph 3 above can clearly be construed as alleging that the transaction alleged to exist between the appellant and respondent was a fraudulent one by reason of the fact that the respondent never signed the documents alleged to constitute such transaction and furthermore, the said documents contained signatures and chop marks which were forged. To that extent therefore, the pleading does explain how and why the alleged transactions was fraudulent. In the circumstances, I do not agree with the learned Judge's conclusion that the allegation of fraud in the statement of defence was a bare one unsupported by particulars. Be that as it may, I do not think that the conclusion arrived at by the learned Judge on this issue had adversely affected the position of the appellant. If any thing, she had perhaps erred in favour of the appellant.

In the course of his submission, Mr. Lau has contended by implication that since the respondent has pleaded forgery as a defence, he is bound to state the particulars as in the case where fraud is pleaded. He cites in support O. 14 r. 18(1) of the Subordinate Courts Rules but the rule does not mention anything about forgery though the word 'fraud' is specifically stated therein. In the absence of authorities, I am therefore not persuaded by Mr. Lau's contention that the rule in question can be construed to apply to a plea of forgery as well.

It has been submitted by Mr. Lau, as I have said, that the learned Judge should not have utilized the respondent's affidavit to correct and or substantiate the defective plea of fraud in the statement of defence. I do not think this is a correct and proper assessment. It seems clear to me that the learned Judge, after having ruled that the statement of defence did not disclose the defence of fraud for lack of particulars, proceeded to deal with the alleged forgery of the signatures and/or the chop marks in the 2 written agreements exhibited as LMT1 and LMT2 respectively. In this connection, she then referred to the various affidavits filed by the parties in dispute and to the conflicting evidence therein. The respondent was able to produce samples of his signatures and chop marks on 2 JKR contract documents previously issued to him. The learned Judge must have considered these documents against those produced by the appellant. In the end, it would appear that she was in some doubt when she concluded as follows:

> ... the question remains as to whether the signature and the chop in LMT1 and LMT2 where forged. Wong Ching Kee deposed that the defendant signed and stamped the company chop on the agreement, while on the other hand, defendant denied having met Wong Ching Kee. To my mind, this allegation of forged signature and chop is a triable issue which ought to be fully thrust out in a proper trial by calling the witnesses. For this reason and on this ground, I dismiss the application ...

Thus, when the affidavits filed by the respondent are examined against those filed by the appellant, I am in agreement with the learned Judge that the respondent has been able to raise a triable issue relating to the question as to whether or not the signatures and/or chop marks of the respondent appearing in the 2 agreements LMT1 and LMT2 allegedly made between the appellant and respondent, were forged. In the circumstances, I can find no merit in the submission of learned Counsel for the appellant. This appeal is therefore dismissed with cost.